1-2015

Re-assessing the evidentiary regime of the International Court of Justice: A case for codifying its discretion to exclude evidence

Siyuan CHEN
Singapore Management University, siyuanchen@smu.edu.sg

DOI: https://doi.org/10.1515/ice-2016-0001

Published in International Commentary on Evidence, 2015, 13 (1), pp. 1-40.
http://doi.org/10.1515/ice-2016-0001

Siyuan Chen*

Re-assessing the Evidentiary Regime of the International Court of Justice: A Case for Codifying Its Discretion to Exclude Evidence

Abstract: Like many international tribunals, the International Court of Justice subscribes heavily to the principle of free admissibility of evidence. Neither its statute nor rules impose substantive restrictions on the admissibility of evidence, whether by way of exclusionary rules or an exclusionary discretion. Instead, the court's practice has been to focus on evaluating and weighing the evidence after it has been admitted. There are certainly features of the ICJ that sets it apart from domestic courts and arguably justify such an approach: the ICJ is for settling disputes between sovereign states; it does not use a typical fact-finding system; its rules and practices reflect a mix of civil and common law traditions; and traditional exclusionary rules were not conceived with inter-state dispute resolution in mind. Yet for any judgment to have legitimacy, the evidential foundations must be strong and there should be a coherent and principled mechanism to sieve out problematic evidence at an early stage. Having this mechanism can also ensure that resources are not wasted and rights protected. Through an examination of the court's rules and jurisprudence and the rules and practices of other international tribunals, this article makes the case for the codification of a provision that gives the ICJ an exclusionary discretion.

Keywords: International Court of Justice, international adjudication, principle of free admissibility, exclusion of evidence, judicial discretion

***Corresponding author: Siyuan Chen,** School of Law, Singapore Management University, 60 Stamford Road 04-11 Singapore Management University, Singapore 178900,
E-mail: siyuanchen@smu.edu.sg

1 Overview

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN),[1] an intergovernmental organisation which today has close to 200 member states.[2] The court's primary responsibility is to decide inter-state disputes which it has jurisdiction over.[3] Judgments by the court, or any of its chambers,[4] are binding upon the parties before it; if a party fails to perform obligations under a judgment, the other party may have recourse to the UN Security Council, which may recommend measures to be taken to give effect to the judgment.[5] Since its work began in 1946, the ICJ has delivered more than a hundred judgments, and its caseload has also been growing steadily in the last couple of decades.[6] Litigation before the ICJ is increasingly seen by states as a viable dispute resolution option.[7]

Despite the broad range of subject matter that the court may assume jurisdiction over,[8] the ICJ statute makes it clear that the court is obligated to decide cases only in accordance with existing international law, which in turn is derived primarily from the rules found in international conventions or treaties, international custom, and general principles of law recognised by civilised nations.[9] The content of substantive public international law, insofar as what the court is bound to apply, is thus discernible.

On matters of evidence, however, there has never been much useful guidance for the ICJ or from the ICJ, despite the court taking on an increasingly

---

1 Statute of the International Court of Justice (18 April 1946) TS 993, art. 1.

2 See http://www.un.org/en/member-states/.

3 Statute of the International Court of Justice, *supra* note 1, arts. 34 and 36. The court also renders advisory opinions occasionally, in which the parties need not necessarily be states.

4 The ICJ generally listens to cases as a full court, but it may also form temporary or permanent chambers for certain types of cases: see, for instance, Statute of the International Court of Justice, *id.*, arts. 26 and 29.

5 Charter of the United Nations (24 October 1945) 1 UNTS XVI, art. 94.

6 See http://www.icj-cij.org/docket/index.php?p1=3&p2=2&lang=en. As of 2016, it has around a dozen cases pending: http://www.icj-cij.org/docket/index.php?p1=3&p2=1. The predecessor to the ICJ, the Permanent Court of International Justice (PCIJ), heard 29 contentious cases and delivered 27 advisory opinions between 1922 and 1940: http://www.icj-cij.org/pcij/index.php?p1=9.

7 Robert Kolb, *The International Court of Justice* (Oxford: Hart Publishing, 2013), 1155–1162.

8 See Rosalyn Higgins, "Departing Thoughts on the International Court of Justice", *Proceedings of the Annual Meeting (American Society of International Law)* 103 (2009): 408, 410–411.

9 Statute of the International Court of Justice *supra* note 1, art. 38. The same article states that the court "shall apply... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

diverse array of cases that involve increasingly complex questions of fact.[10] Indeed, as noted by Judge Owada in *Oil Platforms*, the general lack of clear rules of evidence for the court, combined with the court's seeming aversion to being proactive in regulating the reception of evidence, can cast serious doubts on the legal and factual foundations of decisions rendered by the ICJ.[11] Given the upward trend of parties submitting voluminous amounts of evidence to the court,[12] one may rightly be concerned that the court "has not found the need to articulate its evidence policy in many cases."[13]

This article investigates one particular aspect of the ICJ's approach towards evidence that may warrant reform. Specifically, there is still no concrete framework for the court to answer questions relating to the admissibility and exclusion of evidence; more specifically, there are essentially no express exclusionary rules to filter problematic evidence from the outset, and the court also has no obvious discretion to exclude evidence but can only give evidence it has issues with little or no weight after it has been admitted.[14] The purpose of this article is to ask why, and whether something can and should be done about it.[15] To this end, this article is divided into two main parts.

---

10 See generally Peter Tomka and Vincent-Joël Proulx, "The Evidentiary Practice of the World Court" in *Liber Amicorum Gudmundur Eiriksson*, edited by Juan Carlos Sainz-Borgo. San Jose: University for Peace Press, 2016. See also *Pulp Mills on the River Uruguay (Argentina* v *Uruguay)*, Judgment, ICJ Reports 2010, 14.

11 (*Islamic Republic of Iran* v *United States of America*), Judgment, ICJ Reports 2003, 161, 319–323.

12 Anna Riddell and Brendan Plant, *Evidence Before the International Court of Justice* (London: British Institute of International and Comparative Law, 2009), 159; Juan José Quintana, *Litigation at the International Court of Justice* (Leiden: Brill, 2015), 382–387.

13 Michael Scharf and Margaux Day, "The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences", *Chicago Journal of International Law* 13(1) (2012): 123, 125.

14 While it is recognised that the ICJ has "discretionary authority to refuse to accept evidence offered" (see Durward Sandifer, *Evidence Before International Tribunals* (Virginia: University Press of Virginia, 1975), 184–185), on the few occasions the ICJ (and the PCIJ), exercised such discretion, it did not delve into how it would exercise its discretion to exclude evidence in the future – except that it would do so in the immediate case: see *Jurisdiction of the European Commission of the Danube between Galatz and Braila* (1927) PCIJ Series B, No 14, 32; *Case Concerning the Factory at Chorzow* (1928) PCIJ Series A, No 17, 51; *Case Concerning the Frontier Dispute (Burkina Faso* v *Republic of Mali)*, Judgment, ICJ Reports 1986, 632.

15 The relevant academic literature thus far does not appear to have covered this particular topic in great detail (though there have been writings on evidence in international adjudication generally, the ICJ's general approach to fact-finding, and the ICJ's treatment of particular types of evidence). This topic also gained prominence for probably the first time in Jessup moot court history in 2015–16, when it was one of the main issues presented as a prayer in the *compromis*.

The first part (Section 2) focuses on examining the existing, but relatively limited, rules that govern the admissibility and exclusion of evidence in matters before the ICJ. These rules find expression to varying degrees in the court's statute, practice directions, and rules of court, as well as the court's jurisprudence. The first part of the article further considers the possible explanations for the limitedness of the rules, and also examines the rules and practices of other types of international tribunals that have attempted to exert some control over the admissibility and exclusion of evidence. In so doing, it identifies various gaps in the current evidentiary regime of the ICJ.

The second part of this article (Section 3) builds on the first. It considers, notwithstanding the virtual absence of exclusionary rules, the plausibility of codifying a provision that would delineate the scope of the ICJ's exclusionary discretion. It attempts to make the case that even though the court can justifiably be said to be *sui generis* and its existing evidentiary regime of liberal admissibility can be rationalised, elucidating how the court should exercise its authority to reject evidence would help enhance its legitimacy and protect the rights of states – rectitude of decision should not be its only goal. It then proposes how such a provision can be formulated, before proceeding to justify and lay out the considerations behind this proposal.

2 The existing framework for admissibility and exclusion of evidence

As mentioned, we begin by considering the existing legal framework for the admissibility and exclusion of evidence in proceedings before the ICJ. At this point one is confronted with an imperative threshold question: What sort of evidence exactly might qualify for non-admissibility or exclusion in the first place – would one work from, say, traditional exclusionary grounds in the common law such as hearsay and illegally obtained evidence? Indeed, this question would have justified the commencement of our survey with the relevant case law, before turning to the primary sources of law in the form of the court's statute, rules, and practice directions. This is because the court's decisions (as well as that of other related international tribunals) would have been very useful in immediately illustrating how international litigation has given rise to various situations in which certain types of evidence should have been denied admissibility or excluded at an early stage, but without a clear framework for admissibility and exclusion, it was difficult for the court (that is, the ICJ) to establish the precise legal premises for how the evidence should have been

treated. However, insofar as the ICJ decisions to be discussed did make references to the court's rules, it would be clearer if the latter were properly set out first before we turn to the jurisprudence of both the ICJ and other international tribunals.

2.1 Statute, rules of court, and practice directions

2.1.1 ICJ Statute

The ICJ Statute comprises 70 articles, of which a handful pertain to evidence. Perhaps the starting point of analysis is art. 30(1), which states that the court "shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure."[16] For our purposes, the question that arises at this juncture is whether "rules of procedure" include "rules of evidence", or whether a clear demarcation is to be drawn between the two terms. This is important because if a court can create its own rules of evidence, it would suggest that it may have the discretion to exclude evidence.

A clue to the answer can be found in art. 51, which states that "During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in art. 30". This suggests that art. 30(1) is referring to procedure rather than evidence strictly speaking, despite the provision's express reference to relevance. But even if art. 30(1) can be interpreted to include rules of evidence, art. 30(1) only addresses the question of admissibility and exclusion in a very indirect way: the rule only states that the court has the power to establish its own rules (of evidence and procedure, if art. 30(1) is given the broad interpretation), but as to what those rules are and how they can be applied, they are not elaborated within the ICJ Statute itself.

The next most pertinent provision is probably art. 43(2), which states that the written arguments presented to the court can consist of "all papers and documents in support". Parties are thus expected to submit written pleadings and the relevant evidence at the same time. However, art. 43(2) specifies no conditions of admissibility or grounds for exclusion for such evidence. The remaining ICJ provisions that pertain to evidence also do not appear to address the question of admissibility and exclusion, but point more towards the court having control over its own proceedings.

16 See also *Mavrommatis Palestine Concessions* (1924) PCIJ Series A, No 2, 16.

These provisions include art. 48 (the court shall make all arrangements connected with the taking of evidence),[17] art. 49 (the court may call upon the agents to produce any document),[18] art. 52 (the court may refuse to accept further oral or written evidence after it has received the proofs and evidence),[19] art. 53(1) (the court may rule in favour of the other party if a party does not appear before the court), and art. 61(1) (a judgment may be revised if it is based upon the discovery of a decisive fact that was unknown to the court when judgment was given). Given what we have seen thus far, it cannot be said with great confidence that the ICJ Statute addresses, or was meant to address, questions relating to the admissibility or exclusion of evidence. It follows that it is also silent on whether the court has the discretion to exclude evidence.

2.1.2 ICJ Rules of Court

The ICJ Statute, however, is to be read together with the court's Rules of Court,[20] which are "intended to supplement the general rules set forth in the [ICJ Statute] and to make detailed provision for the steps to be taken to comply with them."[21] In fact, the Rules of Court were promulgated as a result of the court invoking art. 30 of the ICJ Statute, but like the ICJ Statute, the Rules of Court do not contain very comprehensive provisions on evidence, let alone provisions relating to the admissibility or exclusion of evidence.[22] Here, it is apposite to briefly return to the conundrum surrounding art. 30(1) of the ICJ Statute that was sketched out above.

---

17 Another view (see Eduardo Valencia-Ospina, "Evidence Before the International Court of Justice", *International Law Forum du Droit* 1 (1999): 202) is that art. 48 is the starting point of analysis in determining the court's approach to matters of evidence, but perhaps it does not really matter which is the true overarching provision (if there is even one). As will be shown, the statute, rules of court, and practice directions of the ICJ simply offer little guidance on a crucial issue of evidence law: admissibility and exclusion.

18 *Cf* Malcolm Shaw, *International Law* (Oxford: Oxford University Press, 2014), 789: "[The ICJ] has no power to compel production of evidence generally, nor may witnesses be subpoenaed, nor is there any equivalent to proceedings for contempt of court."

19 Art. 56 of the Rules of Court also empowers the court to receive new documentary evidence after the closure of written proceedings; this article is elaborated upon in the next section.

20 ICJ Rules of Court (1978). The rules were last amended in 2005.

21 http://www.icj-cij.org/documents/index.php?p1=4&p2=3&.

22 Markus Benzing, "Evidentiary Issues" in *The Statute of the International Court of Justice: A Commentary*, edited by Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat, and Christian Tams, 1236–1238. Oxford: Oxford University Press, 2013.

Specifically, art. 31 of the Rules of Court states: "In every case submitted to the Court, the President shall ascertain the views of the parties with regard to questions of procedure." Art. 31 is cross-referenced in three other provisions in the Rules of Court, but while two of them have nothing to do with evidence,[23] one of them potentially goes towards the admissibility and exclusion of evidence (and therefore suggests that the phrase "rules of procedure" in art. 30(1) of the ICJ Statute includes rules of evidence): Art. 58(2) states that the "the method of handling the evidence and of examining any witnesses and experts … shall be settled by the Court after the views of the parties have been ascertained in accordance with [art. 31 of the Rules of Court]."

One way to interpret art. 58(2) – and the phrase "method of handling the evidence" in particular – is that the court takes a fairly permissive approach to the regulation of evidence generally, and even does so in consultation with the parties. This permissive approach is seen as well in art. 57, which states that "each party shall communicate to the Registrar, in sufficient time before the opening of the oral proceedings, information regarding any evidence which it intends to produce or which it intends to request the Court to obtain", and that this communication is to contain details of "the witnesses and experts whom the party intends to call, with indications in general terms of the point or points to which their evidence will be directed."[24] In other words, the parties are only required to inform the court ahead of time as to the evidence that will be put forth as a formality, but are otherwise given considerable latitude in preparing the evidentiary foundations of their respective cases.[25] This is consistent with what we saw in the ICJ Statute. But while the parties are given the freedom as regards admissibility of evidence, there is nothing that speaks to the court's discretion to exclude it.

This is not to suggest, however, that the court has no say whatsoever once the hearing has begun. Art. 56 allows a court to reject any request to submit further documents if the written proceedings have closed – though if the

23 The provisions are art. 44(1) (the court can determine the number and order of the filing of the pleadings and their time limits) and art. 44(1) (the applicability of art. 45, which concerns the written procedure).

24 Art. 63 also allows the parties to call witnesses or experts whose names are not included in the information given to the court, and arts. 67 and 68 round up the expert witness provisions, the details of which need not concern us here.

25 See also art. 49, which requires each memorial to contain a statement of the relevant facts and each counter-memorial to contain an admission or denial of those facts, and art. 50, which requires the annexure of any relevant documents that support the contentions in the memorials.

opposing party consents, the court is unlikely to intervene.[26] The same article also states that no reference "may be made during the oral proceedings to the contents of any document which has not been produced".[27] Then there is art. 62(1), which states that the court can "call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue".[28] This is in furtherance of its powers under art. 61 to "indicate any points or issues to which it would like the parties specially to address" and to "put questions to the agents".[29] Finally, there is art. 66, which empowers the court – after consultation with the parties – to make orders concerning the "obtaining of evidence at a place or locality to which the case relates".[30]

In summary, despite the more comprehensive treatment of issues of evidence, the Rules of Court do not really go any further than the ICJ Statute when it comes to questions of admissibility or exclusion. The Rules of Court only confirm that the court prefers to deal with evidence after it has been admitted.

2.1.3 ICJ Practice Directions

For completeness, the Practice Directions of the ICJ should also be considered.[31] The Practice Directions were first adopted in 2001 for use by states appearing

---

26 For instance, in *The Minquiers and Ecrehos Case (France* v *United Kingdom)*, Judgment, ICJ Reports 1953, 47, both parties had filed evidence after written proceedings closed, but since neither party objected to the other party's production, the evidence were successfully admitted. Art. 56 also states that in the absence of consent, the court may authorise the production of the documents after it has heard the parties; further, the opposing party is entitled to comment on the new documents and submit its own new documents in support of its comments.

27 The exception is if the document is "part of a publication readily available". In *Anglo-Iranian Oil Co Case (United Kingdom* v *Iran*), Judgment, ICJ Reports 1952, 93, the court was firm in stating that documents that were filed late and not in accordance with procedure could not be produced or referred to.

28 This power has only been invoked once in the recent history of the ICJ: *Litigation at the International Court of Justice*, *supra* note 12, at 424.

29 Under art. 65, the court may also put questions to the witnesses, and under art. 64, the witnesses are put on oath to tell the truth before giving evidence.

30 This article was invoked for the first time in *Gabcikovo-Nagymaros Project (Hungary/ Slovakia)*, Judgment, ICJ Reports 1997, 7. There, the court made a site visit to a hydroelectric dam between the first and second round of oral pleadings, and the court were able to put questions of fact to both parties after being given technical explanations by the states' advisors.

31 ICJ Practice Directions (2001). The Practice Directions were last amended in 2013.

before the ICJ.[32] They are fairly brief, and also do not directly address matters relating to admissibility or exclusion. Instead, they appear designed to remind parties of the practices that are expected to be adopted at various points of the proceedings, and were somewhat intended as a check against parties submitting evidence in a tardy fashion.[33]

The most pertinent provisions for present purposes are:[34] Practice Direction III, which states that parties should avoid the "excessive tendency towards the proliferation and protraction of annexes to written pleadings";[35] Practice Direction IX(2), which states that a party seeking to submit new documents after the closure of the written proceedings "shall explain why it considers it necessary … and shall indicate the reasons preventing the production of the document at an earlier stage";[36] Practice Direction IXbis, which in the main stipulates guidelines for documents that are submitted after the close of written proceedings and claimed to be "part of a publication readily available"; and Practice Direction IXquater, which stipulates guidelines for the presentation of audio-visual or photographic material at the hearings.

It should be noted that the Statute, Rules of Court, and Practice Directions of the ICJ do not explicitly state the consequences for non-compliance. Presumably, if there is any evidence that do not conform with the procedures and guidelines set out, the court has the power to reject such evidence. However, rejection of evidence on these grounds would be based on a breach of procedure and formality, rather than for reasons relating to unreliability or normative, non-epistemic considerations.

2.1.4 Preliminary observations on the ICJ's rules of evidence

Before we turn to consider the jurisprudence, it may be helpful to take stock of what we have seen thus far. The ICJ Statute, its Rules of Court, and its Practice Directions all confirm that while the ICJ does have control over its own process

32 The Practice Directions are only meant to supplement, and not alter, the Rules of Court: http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0.

33 "Departing Thoughts on the International Court of Justice", *supra* note 8, at 408–410. See also *Evidence Before the International Court of Justice*, *supra* note 12, at 25.

34 Interestingly, Practice Direction XIII cross-references to art. 31 of the Rules of Court – the article which, as seen earlier, potentially allows the court to set its own rules on evidence – but it sheds no light whatsoever as to what the phrase "questions of procedure" entails.

35 This is also reiterated in Practice Direction IXter.

36 See also art. 56 of the Rules of Court, which was referenced earlier.

and can take initiatives to satisfy itself that there is sufficient evidence and that there is equality of arms between the parties, none of these sources of law say anything about when evidence should be inadmissible or should be excluded.[37] It is hardly an exaggeration to state that it is often completely up to the parties to determine what is relevant and admissible,[38] given that there are no express rules that render any evidence inadmissible on substantive grounds (as opposed to the non-compliance with the procedural requirements on how the evidence is to be submitted, such as timely filing).[39] In addition, if a party does not object to facts submitted by the opposing party in the written submissions, the evidence is effectively considered admitted, though the court is free to decide the weight of any admitted piece of evidence.[40] All of this points to the ICJ subscribing to the principle of free admissibility. But the question that recurs, and that remains unresolved, is: on what grounds can the evidence even be challenged at the admissibility stage?

That is the precise purpose of this article, but for the moment, one explanation given for this "liberal evidentiary regime" is that "the Court appears to have been influenced primarily by continental legal systems, with written evidence more common than oral evidence" even though "there is no true hierarchy of different forms of evidence before the Court."[41] Related to this is the historical

37 See also Shabtai Rosenne, *The Law and Practice of the International Court* (Leiden: Martinus Nijhoff, 1985), 557, who claims that "the restrictions upon admissibility of evidence sometimes encountered in national procedure have no place in international adjudication, where the relevance of facts and the value of evidence tending to establish facts are left to the entire appreciation of the court."

38 See also *Evidence Before International Tribunals*, *supra* note 14, at 189: "admission is a matter of right, and the burden is upon the party challenging any piece of evidence to show that the particular procedural law of the tribunal will be violated by a refusal to exclude it."

39 Rüdiger Wolfrum and Mirka Moldner, "International Courts and Tribunals, Evidence" in *Max Planck Encyclopaedia of Public International Law*, [58]. Oxford: Oxford University Press, 2013. See also *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua* v *United States of America)*, Judgment, ICJ Reports 1986, 14, 26 and 40: "the presentation of pleadings and evidence are designed to secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent's contention... The presentation of evidence is governed by specific rules relating to... the observance of time-limits, the communication of evidence to the other party, the submission of observations on it by that party, and the various forms of challenge by each party of the other's evidence".

40 "International Courts and Tribunals, Evidence", *id*. at [61].

41 "Evidence Before the International Court of Justice", *supra* note 17, at 204. See also Michael Reisman and Eric Freedman, "The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication", *American Journal of International Law* 76 (1982): 737, 738–739.

fact that the predecessor to the ICJ – the PCIJ, as well as many international arbitral tribunals contemporaneous to it – had either given parties liberal recourse to all types of evidence or parties seldom saw the need to object to the admissibility of evidence, and this reinforced the impression that there were virtually no barriers to the admissibility of evidence.[42] Thus, while the court system in adversarial in nature, the court's approach towards the regulation of evidence is more in line with civil traditions.[43] This extreme flexibility was, and still is, perceived to pose no problems especially in the context of the ICJ since the court, which comprises highly trained legal professionals,[44] is supposed to be able to "ascertain the weight and relevance of particular evidence ... [and are] not considered to need 'protection' from potentially unreliable evidence."[45]

Further, because "equality of the parties is the leading principle governing inter-state litigation", the concern of vulnerability of parties does not arise.[46] Respect for the sovereign equality of the parties – and their consent to appear before the ICJ – also means that states are given great latitude in how they "express themselves on the relevant facts; the accuracy of facts within the knowledge of the state concerned and submitted by it should not be questioned without good reason."[47] As a result, although the ICJ is given great freedom to formulate its own rules of admissibility and exclusion, it exercises this power sparingly given the context in which it finds itself in,[48] choosing instead to fall back on the safeguard of attributing weight to the full range of evidence presented to it. However, a survey of the court's jurisprudence would expose a variety of cracks in adopting an overly liberal approach, to which we now turn.

---

42 *Evidence Before the International Court of Justice*, *supra* note 12, at 70. This appears to be the case for another tribunal that is closely related to the ICJ – the International Tribunal for the Law of the Sea (ITLOS). Indeed, the ITLOS, being another judicial organ of the UN and another court that presides over inter-state disputes, has almost the same rules of procedure and evidence as the ICJ, and the proposals made here may be applicable to it as well.

43 "International Courts and Tribunals, Evidence", *supra* note 39, at [2]–[3].

44 According to art 2. of the ICJ Statute, ICJ judges "must be elected from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognised competence in international law."

45 "Evidence Before the International Court of Justice", *supra* note 17, at 205.

46 "International Courts and Tribunals, Evidence", *supra* note 39, at [5]–[6].

47 "International Courts and Tribunals, Evidence", *id*. at [13]). See also *The "Grand Prince" (Belize* v *France)*, ITLOS Case No 8 (2001), [76]–[93].

48 See Chittharanjan Felix Amerasinghe, *Evidence in International Litigation* (Leiden: Brill, 2005), 163–166. See also Gleider Ignacio Hernandez, *The International Court of Justice and the Judicial Function* (Oxford: Oxford University Press, 2014), 59.

2.2 Jurisprudence of the ICJ and the rules and practices of other international tribunals

Before proceeding, it should be noted that the decisions of both the PCIJ and ICJ would be considered here. In discerning the evidentiary regime established by the ICJ, it is necessary to trace the development of the jurisprudence to the PCIJ as well, as the seeds of the current philosophy first took fruit in the decisions handed down by the predecessor to the ICJ, and it would be artificial in light of this to consider one court to the exclusion of the other.[49] In addition, as one of the aims of this article is to extract lessons from the rules and practices of other international tribunals, where appropriate, their decisions would be considered as well. The final preliminary point to be made is that the jurisprudence to be examined is organised by categories of exclusion rather than chronology. This makes it easier to identify the gaps in the court's current framework for admitting and excluding evidence.

2.2.1 Evidence from prior settlement negotiations

But our survey of the jurisprudence begins not with a gap in the current framework of the ICJ but an anomaly: a ground of exclusion – and the only one it appears[50] – that has clearly been accepted by the court over the years. In many domestic legal systems, it is common to prohibit the admissibility of evidence of matters that transpired at settlement negotiations preceding the trial.[51] The

49 Further, while ICJ cases do not have the force of *stare decisis*, the court has always relied on its own jurisprudence in procedural and evidential questions: "Evidentiary Issues", *supra* note 22, at 1237.

50 As mentioned earlier, although a court can reject evidence that is filed out of time (art. 56 of the Rules of Court), this requires the evidence to be filed out of time first. If the evidence is not filed out of time, then what might justify its exclusion if the rules (and jurisprudence) are otherwise silent? For this reason, excluding evidence on the basis of its lateness – and the fact that the reason of lateness is itself a procedural ground – cannot properly be described as exclusion on a substantive ground, which is the main concern of this article. The same applies to evidence that is rejected because it is not filed in accordance with art. 52 of the ICJ Statute (in this regard see also *Case of the Free Zones of Upper Savoy and the District of Gex* (1932) PCIJ Series A/B, No 46, 155).

51 See for instance s. 131 of Australia's Evidence Act 1995, s. 57 of New Zealand's Evidence Act 2006, or s. 23 of Singapore's Evidence Act (which is replicated in all other Indian Evidence Act jurisdictions), r. 408 of USA's Federal Rules of Evidence. In terms of case law, see Canada's *Sable Offshore Energy Inc* v *Ameron International Corp* [2013] 2 SCR 623 and United Kingdom's *Ofulue* v *Bossert* [2009] 2 WLR 749.

rationales for this prohibition are inter-related and rooted in policy: settlement-related evidence should be irrelevant or inadmissible as any settlement offers made during such negotiations may be motivated by a desire to avoid acrimony or costly legal battles, and therefore have nothing to do with the merits of the claim; further, if evidence of settlement negotiations can used to prejudice a party's claim later on, parties would in all likelihood be inhibited from exploring an amicable resolution to a dispute.[52] This rule, as well as its rationales, has been accepted by both the PCIJ and ICJ as a clear ground for not admitting evidence.

The first case to recognise the rule appears to be *Case Concerning the Factory at Chorzow*.[53] In that case, there was a nitrate factory that was located in German territory when it was first built. Following several uprisings in the region and Polish independence, the said territory was awarded to Poland. Poland then unilaterally transferred possession and management of the factory to a Polish national. Germany and Poland had concluded a convention that regulation expropriation, so Germany brought a claim on behalf of its aggrieved nationals against Poland before the PCIJ. The court held that the convention was breached.

For the purposes of deciding the quantum of compensation payable, the court held that it could not "take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement."[54] This position was reiterated by the ICJ in subsequent cases,[55] such as the *Case Concerning the Frontier Dispute*.[56] The parties had submitted to the court an agreement that related to a disputed frontier line and was negotiated by the parties, but was not then approved by the competent authorities of each party. The court cited *Chorzow Factory* to hold that this agreement could not be accepted as evidence.[57] A clear ground of inadmissibility or exclusion thus exists by virtue of the ICJ's jurisprudence.[58]

---

52 Jeffrey Pinsler, *Evidence and the Litigation Process* (Singapore: LexisNexis, 2015), 621–627.

53 (1927) PCIJ Series A, No 9.

54 *Case Concerning the Factory at Chorzow*, *id*. at 51.

55 This position was also echoed in subsequent PCIJ cases, such as *Case Relating to the Territorial Jurisdiction of the International Commission of the River Order* (1929) PCIJ Series A, No 23, 42 and *The Diversion of Water from the River Meuse* (1937) PCIJ Series C, No 81, 220–224.

56 *(Burkina Faso* v *Republic of Mali)*, Judgment, ICJ Reports 1986, 554.

57 *Case Concerning the Frontier Dispute*, *id*. at 632–633.

58 This ground of exclusion has also been accepted in the jurisprudence of other tribunals, such as the Iran-US Claims Tribunal.

2.2.2 Evidence obtained through forgery or falsification

Beyond the clearly established category of evidence obtained through prior settlement negotiations, however, the ICJ has remained consistently and worryingly ambivalent about exercising any exclusionary power even in the face of a variety of problematic evidence being submitted to the court. One example is that of forged or falsified evidence. In *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the dispute was over the sovereignty over certain islands, sovereign rights over certain shoals, and the delimitation of a maritime boundary.[59] Though the case was instituted in 1991 and fully decided in 2001, the disagreement between Qatar and Bahrain had begun several decades prior.

One of the main points of disagreement was over the Hawar Islands, which had attracted competing claims of sovereignty from Qatar and Bahrain since the 1930s. Back then, the sheikdoms of Qatar and Bahrain were British protectorates supervised by a Political Resident based in Persia. For the decades that followed, there were a number of significant communications and documents relating to the ownership of the islands between the Political Resident, the British India Office, and Political Agents deployed to the various sheikdoms. Protests, allegations of illegal occupation, and failed negotiations eventually led Qatar to seek a declaration of sovereignty over the islands from the ICJ.

In one set of Qatar's written submissions to the court, there were more than 80 annexures comprising hitherto undisclosed diplomatic correspondence and maps emanating from Bahraini officials that seemed to recognise Qatari sovereignty over the islands. Initially, Bahrain thought they were going to lose the case because of the sudden appearance of such highly damaging evidence. But after some forensic and historical analyses, Bahrain suspected that these documents were forged, and challenged the authenticity of these documents; it also stated that it would disregard the content of those documents in the preparation of its own memorial.

Despite a protracted series of communications with the court, Qatar continued to rely on the contents of the challenged documents, and Bahrain requested the court to decide the question of the use of such documents as a preliminary issue. The court ordered Qatar to file a specific and comprehensive report on the issue of authenticity, and for Bahrain to file a reply accordingly. Qatar ultimately decided that it would not rely on the disputed documents and admitted that two of its own experts had questioned the authenticity of the documents. It also claimed that it was no longer relying on the documents as it

59 *(Qatar* v *Bahrain*), Judgment, ICJ Reports 2001, 40.

wanted to spare all the parties "procedural complications".[60] However, apart from noting Qatar's eventual non-reliance of the document in its written judgment, the court did not say much more.[61] One commentator expressed his disagreement this way: "it might be opportune for further thought to be given to the procedure that should be followed if it is alleged that false evidence has been presented to the Court, as well as investigating the sanctions available".[62] In point of fact, this was not the first time that the ICJ was confronted with an allegation of altered documents.[63] In a previous case, the court chose not to say anything as well, effectively treating those documents as non-existent.[64]

The presentation of falsified evidence, however, has also been a problem for other international tribunals, but not all have responded the same way as the ICJ. For instance, in *The Prosecutor* v *Jean-Pierre Bemba Gombo*, the accused person was charged in the International Criminal Court (ICC) with crimes against humanity and war crimes.[65] One of the issues was whether he had effectively acted as a commander of certain rebels. To dispute this, he called 34 witnesses to testify, but 14 of them were later found to have lied so as to aid his case. Pursuant to art. 70 of the Rome Statute – which gives the court jurisdiction over the offence of intentional presentation of false or forged evidence – a number of these witnesses were arrested and charged.[66] So while art. 70 is not a direct means of excluding falsified or forged evidence, it at least serves as a deterrent to prevent parties from submitting such evidence in the first place.

To cite further examples of international tribunals which have responded to the issue of falsified or forged evidence, both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and Rwanda (ICTR) have in their rules of procedure and evidence provisions that allow their courts to request

---

60 Maurice Mendelson, "The Curious Case of *Qatar* v *Bahrain* in the International Court of Justice", *British Yearbook of International Law* 72(1) (2001): 183, 200.

61 Judge Fortier did, however, express in a Separate Opinion that the documents infected the entirety of Qatar's case and could have jeopardised the legitimacy of the court. See also the Dissenting Opinion of Judge Schwebel in *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 39, at 259, where he opined that the case had turned on fabricated testimony.

62 "The Curious Case of *Qatar* v *Bahrain* in the International Court of Justice", *supra* note 60, at 200.

63 See *Case Concerning Elettronica Sicula SpA (ELSI) (United States of America* v *Italy)*, Judgment, ICJ Reports 1989, 15, 30.

64 *Litigation at the International Court of Justice*, *supra* note 12, at 429–430.

65 ICC-01/05-01/08.

66 Rome Statute of the International Criminal Court (1 July 2002) 2187 UNTS 90. Art. 24(3) of the Code of Professional Conduct (1 January 2006) also obligates counsel not to deceive or knowingly mislead the court.

verifications of the authenticity of evidence.[67] The ICC, ICTY, and ICTR all seem to recognise that without either a penal sanction to deter forgery or a rule that confirms that the court can compel parties to verify the authenticity of evidence, the court can only rely on the good faith of parties (not to falsify evidence), the professionalism of counsel (not to abet falsification), and the competence of counsel (to be vigilant enough to detect forgery).[68] In this respect, modern international criminal tribunals have evolved from the position of non-intervention adopted by older ones such as the International Military Tribunal at Nuremberg.[69] The rules they have put in place also complement the ethical duties exhorted of counsel, such as those found in the 2010 Hague Principles on Ethical Standards of Counsel Appearing Before International Courts and Tribunals.[70]

2.2.3 Evidence obtained through a violation of law

At any rate, if the ICJ had kept silent in *Maritime Delimitation* because Qatar ultimately gave up relying on the alleged forged documents and the documents were never conclusively shown as forged, then the court's reticence and inaction in the face of evidence obtained under clearly illegal circumstances is more difficult to explain, much less defend. In the *Corfu Channel Case*, the United Kingdom carried out a mine-sweeping operation in the Corfu Channel against the will of Albania.[71] The United Kingdom argued that this intervention was justified as it needed to secure possession of important evidence to present to an

67 Rules of Procedure and Evidence of the International Criminal Tribunal of the Former Yugoslavia UN Doc IT/32/Rev3, 30 January 1995, r. 89(E); Rules of Procedure and Evidence of the International Criminal Tribunal of Rwanda UN Doc IT/3/Rev1, 29 June 1995, r. 89(D). Another international tribunal which has responded differently from the ICJ is the Caribbean Court of Justice, where in its Original Jurisdiction Rules 2015, it obligates counsel not to knowingly or recklessly mislead the court.

68 See generally Geoffrey Marston, "Falsification of Documentary Evidence Before International Tribunals: An Aspect of the *Behring Sea* Arbitration", *British Yearbook of International Law* 71(1) (2000): 357.

69 "International Courts and Tribunals, Evidence", *supra* note 39, at [84]. The tribunal, for instance, presumed official documents to be accurate.

70 Art. 6.1 states: "Counsel shall present evidence in a fair and reasonable manner and shall refrain from presenting or otherwise relying upon evidence that he or she knows or has reason to be believe to be false or misleading." See also the Special Court for Lebanon's Code of Professional Conduct for Counsel Appearing Before the Tribunal, STL-CC-2011-01.

71 *(United Kingdom of Great Britain and Northern Ireland* v *Albania)*, Judgment, ICJ Reports 1949, 4.

international tribunal. While the ICJ rejected this line of argument and essentially held that such a violation of Albanian sovereignty was a breach of international law, it stopped short of addressing the ancillary issue of whether the evidence that had been obtained as a result of the operation was admissible against Albania.

Just like in the case of *Maritime Delimitation*, the court's silence in respect of this issue is in no small part due to the fact that it did not have to rely on the evidence in its decision (and Albania also did not lodge any objection to the evidence), but at the same time, the court did not expressly exclude the evidence concerning the mines either.[72] This is plainly unsatisfactory, because while it is an established principle in international law that no one is allowed to take advantage of his own wrongdoing, "no general exclusionary rule of evidence can be inferred from the judgment of the Court" in the *Corfu Channel Case*.[73] The corollary must be that illegally obtained evidence can be admitted, and possibly relied upon in cases before the ICJ.[74]

But the principle that no one is allowed to take advantage of his own wrongdoing is also widely recognised in domestic law. The violation of law in the *Corfu Channel Case* was an international one – would the outcome be any different if the violation is a domestic one? Since a violation of international law is usually of greater gravity than a violation of domestic law, one would assume, *a fortiori*, that evidence obtained in violation of a domestic law would be admissible if the *Corfu Channel Case* is to be followed.[75] In this regard, it is interesting to note the decision by the Court of Justice of the European Union (CJEU) in *Persia International Bank plc* v *Council of the European Union*.[76]

---

72 The only comment in relation to evidence that the court made in passing was that even though it was obligated "to consider the submissions of the party which appears, [the ICJ Statute] does not compel the court to examine their accuracy in all their details; for this might... prove impossible in practice": *Corfu Channel Case*, *id*. at 248.

73 *Evidence in International Litigation*, *supra* note 48, at 178. The *United States Diplomatic and Consular Staff in Tehran Case (United States of America* v *Iran)*, Judgment, ICJ Reports 1980, 3 appears to be the only other PCIJ or ICJ case that could have involved the question of excluding illegally obtained evidence, but Iran did not appear in the case.

74 *Litigation at the International Court of Justice*, *supra* note 12, at 385.

75 See also William Thomas Worster, "The Effect of Leaked Information on the Rules of International Law", *American University International Law Review* 28(2) (2013): 443, 464. It should also be noted that the concept of *crimen omnia ex se nata vitiate* may be limited to common law jurisdictions.

76 (2013) T-493/10. There is also the case of *Prosecutor v Salim Jamil Ayyash*, Case No STL-11-01/T/TC (2015), which talks about whether leaked documents should be admissible on the grounds of relevance and reliability.

There, the applicant was alleged to have been involved in activities relating to Iranian nuclear proliferation, and as a result it was subject to restrictive measures implemented by the Council of the European Union. The applicant pointed to diplomatic cables that had been made public through the Wikileaks website revealing that certain European states were adopting restrictive measures against Iranian entities only because of pressure from the government of the United States. The respondent argued that no weight should be given to the cables as they were obtained in violation of various domestic laws. The court, however, held that "since the applicant was not involved in the disclosure of the diplomatic cables, the possibly unlawful nature of that disclosure cannot be held against it."[77] One way to interpret this case, therefore, is that evidence obtained in violation of domestic laws may be admissible in an international tribunal if the party seeking to adduce the evidence was not the party that committed the violation. Whether this is true for evidence obtained in violation of international law remains an open question, at least as far as the ICJ is concerned.

Comparison may also be drawn with the practice of international criminal tribunals. For instance, r. 95 of the Rules of Procedure and Evidence of the ICTY states that evidence shall not be admissible "if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."[78] This rule is mirrored in the Rules of Procedure and Evidence of the ICTR, and expressed in arguably broader terms in r. 95 of the Special Court for Sierra Leone Rules of Procedure and Evidence: "No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute."[79] All of the aforesaid rules are wide enough to cover various permutations of illegally obtained evidence. What might account for the omission of an equivalent rule for the ICJ? That international criminal tribunals deal exclusively with (serious) criminal

---

77 *Persia International Bank plc* v *Council of European Union* (2013) T-493/10, [95]. However, while the court also noted the authenticity and credibility of the evidence, it did not think it was probative of the allegation that the restrictive measures were put in place only because of American pressure.

78 The draft of this rule provided that evidence through a violation of international human rights would not be admissible. In *Prosecutor* v *Brdanin (Radoslav)*, Case No IT-99-36-T (ICTY 2003), the trial chamber held that evidence obtained illegally (in this case, there were transcripts of intercepted telephone conversations) was not *a priori* inadmissible, as the court had to also consider the manner in which the evidence was obtained, the surrounding circumstances, the reliability of the evidence, and the effect of its admission on the integrity of proceedings.

79 As amended 7 March 2003. See also Special Tribunal for Lebanon Rules of Procedure and Evidence, STL-BD-2009-01-Rev.8, r. 162.

charges? That international criminal tribunals do not handle inter-state disputes but proceedings against individuals? That there is not as great a need to ensure the legitimacy of the ICJ? That the regulation evidence is somehow not important in ICJ proceedings? This is something we will revisit in the second part of this article.

2.2.4 Evidence claimed to be confidential in nature

But even if evidence had not been obtained through illegal means – whether in the sense of domestic or international law – there may be situations where crucial evidence may be confidential, and in certain cases implicate state secrets or national security and consequently, state sovereignty. That we have already seen above in *Persia International Bank plc* (though one needs to bear in mind that the mandate of the CJEU is very different from a court that hears only disputes between states). The ICJ has actually considered a situation of confidential evidence as well, but not in the context of a party seeking to adduce it to the detriment of the other party.[80] Instead, it was in the context of whether a party or the court can compel the other party to adduce evidence that may compromise state secrets, and whether highly redacted versions of such evidence should be considered admissible.

In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Bosnia and Herzegovina alleged that Serbia and Montenegro had contributed to acts of genocide by failing to prevent and punish acts of genocide during the Bosnian War.[81] One of the arguments that Bosnia and Herzegovina made was that the default burden of proof in proving the claim should be reversed because Serbia and Montenegro had exclusive territorial control of certain important and incriminating evidence. In addition, Bosnia and Herzegovina only had access to highly redacted copies of documents of the Supreme Defence Council of Serbia – classified as a military secret by the Council of Ministers of Serbia and Montenegro – which could prove that there was state control over one of the alleged massacres.

The ICJ denied the request to prohibit Serbia and Montenegro from using the redacted documents, and also did not call upon Serbia and Montenegro to

80 See also *Jurisdiction of the European Commission of the Danube between Galatz and Braila* (1927) PCIJ Series B, No 14, 32, where the PCIJ declined admission of the history of articles of the Versailles Treaty on the basis that they were confidential and had not been placed before the court by the competent authority.

81 *(Bosnia and Herzegovina* v *Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43.

provide the non-redacted versions to Bosnia and Herzegovina.[82] It justified its decision by first pointing to the availability of other evidence that could have proven the claims of Bosnia and Herzegovina,[83] and secondly to the possibility of drawing, pursuant to art. 49 of its statute, "its own conclusions" against a party resisting disclosure in appropriate cases.[84] But in so doing, the court avoided, consciously or otherwise, the difficult question of the extent to which a state can refuse disclosure of evidence by claiming confidentiality or the protection of sovereign interests.[85] In a related vein, it also passed on the opportunity to clarify if evidence that may implicate an opposing state's state secrets or interests may be deemed inadmissible or excluded.

As to the first question, it has been noted that the court took a "progressive step" in implying that art. 49 allows the court to draw adverse inferences against the resisting party, as opposed to merely formally noting the refusal to produce evidence.[86] But the second question is the one that is of greater relevance here, since the first relates more a ground for resisting disclosure[87] and burden of proof and standard of proof (when an adverse inference is drawn). On appearance, it is similar to the aforementioned scenario of evidence obtained in violation of a law, but it is conceivable that a state can come into possession

82 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *id*. at 129. In a dissenting opinion, the Vice-President noted that these documents were the best possible evidence that would have shed light on the central issues in the dispute.

83 *Cf* Richard Joseph Goldstone and Rebecca Hamilton, "*Bosnia* v *Serbia*: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia", *Leiden Journal of International Law* 21 (2008): 95, 108: "The un-redacted documents were not available to Bosnia and Herzegovina from the ICTY because of a confidentiality order imposed by the Tribunal at Serbia's request."

84 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 81, at 129.

85 "*Bosnia* v *Serbia*", *supra* note 83, at 109–110. See also *Prosecutor* v *Blaskic (Tihomir)*, Case No IT-95-14 (ICTY 1997), [65]: "to grant States a blanket right to withhold, for security purposes, documents necessary for trial might jeopardise the very function of the [ICTY]... [which] was established for the prosecution of persons responsible for war crimes, crimes against humanity and genocide; these are crimes related to armed conflict and military operations. It is, therefore, evident that military documents or other evidentiary material connected with military operations may be of crucial importance".

86 Chittharanjan Felix Amerasinghe, "The Bosnia Genocide Case", *Leiden Journal of International Law* 21 (2008): 411, 422.

87 To be clear, the court in this case did not, as it also did not in the *Corfu Channel Case*, characterise evidence that was withheld on the basis of national security or state secrets as the invocation of privilege. However, the states that withheld evidence in these two cases were effectively relying on privilege, and the ICJ also does not appear to distinguish between inadmissibility and privilege: "Evidentiary Issues", *supra* note 22, at 1242–1244.

of another state's confidential evidence, or evidence that may implicate another state's national interests, without violating any law (through the opposing state's accidental disclosure for instance). When this happens, on what ground can the other state object to the adduction of the evidence? As it stands, there is nothing in the law that creates this right. And it is precisely because ICJ seldom ventures beyond what is necessary when explicating the law that a proper framework for the admissibility and exclusion of evidence should be created.

2.2.5 Evidence that is privileged

Closely linked to the concept of confidential evidence is privileged evidence. While the concepts overlap, they can also be quite different; for instance, in the context of international litigation, evidence may be claimed to be confidential because, as we just saw, it implicates state secrets or national security interests, while evidence may be claimed to be privileged simply as a result of protecting the attorney-client relationship (with the state being the client).[88] It is also true that privilege is conceptually very different from issues of admissibility; the former is essentially about rights and immunities that exist because of policy considerations (such as to promote uninhibited communication between attorney and client), while the latter is more about the quality of the evidence, generally evaluated in terms of relevance (in the broadest sense of the word) and reliability. But what connects the two concepts is that of respecting and protecting sovereign equality and sovereign prerogative. Indeed, the question facing us is this: Does a state have any recourse under the current ICJ evidentiary regime if another state has obtained evidence that the former may claim privilege over, regardless of whether one considers privilege a ground of exclusion in the strict sense or an aspect of immunity?

In *Questions Relating to the Seizure and Detention of Certain Documents and Data*, Australian intelligence officials had planted surveillance bugs in the cabinet office of East Timor to gather information about the negotiations of a treaty pertaining to sea and natural resources.[89] East Timor launched a case at the Permanent Court of Arbitration (PCA) to pull out of the treaty when it learned of this. Australia then raided the office of a lawyer in Canberra and took certain documents; the lawyer was one of the counsel acting for East Timor in the PCA proceedings. Australia claimed that the raid was necessitated by national

88 See also Michelle Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (Oxford: Oxford University Press, 2009), 276–288.

89 *(Timor-Leste* v *Australia)*, Provisional Measures, ICJ Reports 2014, 147.

security interests. East Timor sought provisional measures from the ICJ pursuant to art. 41 of the ICJ Statute, arguing that its preparations for the PCA proceedings would be irreparably prejudiced if the privileged documents were not returned immediately. In response, Australia made several undertakings not to misuse the documents. Australia eventually returned the documents, but not before the ICJ holding that Australia had to: ensure that the seized material would not be used to the disadvantage of East Timor until the PCA proceedings had concluded; keep under seal the seized material; and not interfere in any way in communications between East Timor and its legal advisors in connection with the PCA proceedings or any other related procedure.[90]

What may be made of this case for present purposes? First, while the bar for obtaining provisional measures from the ICJ is not a very high one – the court must be satisfied that the rights asserted by the requesting party are plausible, a link exists between the rights and the measures sought, and there is a real and imminent risk of irreparable prejudice[91] – it seems odd that a party is unable to rely on a rule of evidence and has to resort to what is essentially an injunction to protect its basic rights. This is not to say that a rule should exist to the exclusion of the availability of provisional measures since provisional measures serve a variety of purposes and should be used when there are matters of urgency, but that having a rule of some sort could have prevented parties from obtaining (and subsequently adducing) evidence in breach of it in the first place. Having such a rule also affects whether a party may be asked questions in relation to such evidence. To prevent abuse, the court will have the discretion to examine the evidence *in camera*, whether by itself or through another neutral third party. All of this is generally consistent with the practice of certain international arbitral tribunals that preside over disputes involving states, such as the International Centre for Settlement of Investment Disputes (ICSID),[92] though not so with others such as the dispute settlement system of the World Trade Organisation.[93] As it were, in this case Australia was not even obligated to return the evidence it had taken; it was simply presumed by the court that it would act in good faith and not renege on the undertakings ordered. Nothing conclusive was said about Australia's reliance on national security considerations.

---

90 *Questions Relating to the Seizure and Detention of Certain Documents and Data*, *id*. at 160–161. Three dissenting and two separate opinions were rendered, but the details of those opinions need not concern us here.

91 *Questions Relating to the Seizure and Detention of Certain Documents and Data*, *id*. at 153–155.

92 ICSID Convention Arbitration Rules (10 April 2006), Chapter IV. See also IBA Rules on the Taking of Evidence in International Arbitration (2010), arts. 3 and 9.

93 "International Courts and Tribunals, Evidence", *supra* note 39, at [81].

The other observation to be made is that this case involved a rather extreme confluence of various facts, giving rise to a unique legal problem. Specifically, if the evidence had only been obtained in violation of a law (whether domestic or international), it could have fallen under the *Corfu Channel Case* analysis. If it was only about stopping an opponent from using highly redacted material, it could have fallen under the *Genocide Convention* analysis. Instead, this case was about an opponent obtaining privileged documents through possibly illegal means and whether something could be done to stop it from using those documents – it was never made clear if the privileged documents would have been used during the litigation, but regardless, the point is that no rule exists to prevent a state from using another state's privileged documents in ICJ litigation. We thus return to the dilemma of whether this is a question of admissibility or privilege, and the only thing that is clear is that there is nothing in the ICJ's rules or jurisprudence that addresses this gap. However, a resolution to the dilemma may perhaps be found in the court's established approach towards evidence of prior settlement negotiations. Evidence in that context is inadmissible or excluded not because the evidence has no probative value or is unreliable; rather, as a matter of policy, such evidence should just not be considered relevant to begin with.[94] The same reasoning can be applied here, but the exact mechanics for rejecting the admissibility of privileged evidence will be considered in the second part of this article.

2.2.6 Expert evidence

Our survey of the ICJ's jurisprudence concludes with the use of expert evidence. In stark contrast to other possible grounds of exclusion covered thus far, there are – as we have seen earlier – a number of provisions in the ICJ's Statute, Rules of Court, and Practice Directions that are related to the use of expert evidence. However, none of them provide any guidance on the two main issues – issues not unfamiliar in domestic litigation – that arise whenever there is expert evidence adduced: first, whether the evidence should be admissible to begin with; and secondly, how the expert evidence should be evaluated, especially when there are conflicting accounts.

---

94 Indeed, when Sir James Fitzjames Stephen wrote the Indian Evidence Act which would later be exported to more than a dozen British colonies, he considered evidence from settlement negotiations not as privileged evidence, but irrelevant and inadmissible evidence. The position remains the same today in Indian Evidence Act jurisdictions: see generally Chen Siyuan and Lionel Leo, *The Law of Evidence in Singapore* (Singapore: Sweet & Maxwell, 2016), Chapter 8.

Generally speaking, the resolution of the first issue depends on whether the expert in question is reliable and whether his testimony is relevant to the issues at hand, while the resolution of the second issue depends on whether the court is qualified to properly appraise the expert evidence.[95] Although recourse to expert evidence has been rare in the ICJ's practice,[96] the recent case of *Whaling in the Antarctic* saw the court attempt to clarify its approach in receiving expert evidence.[97] Previously, the court had never said anything concrete on this matter, save that testimony from experts appointed by the court under art. 50 of its statute would be given great weight,[98] while submissions from experts who double-up as counsel would be given little weight as they are not subject to cross-examination.[99]

In *Whaling in the Antarctic*, Australia alleged that Japan was using a scientific research programme as a cover for commercial whaling in the Antarctic; in the main, Australia pointed to the lack of research output relative to the number of whales killed. Japan claimed that its actions were permitted under the International Convention for the Regulation of Whaling.[100] Experts were appointed by the parties pursuant to arts. 57 and 64 of the ICJ's Rules of Court. Notably, one of Australia's experts was a member of the Australian government, while Japan refrained from appointing any of the Japanese scientists involved in the programme as experts. This brought about the question of whether it was appropriate to appoint an expert with a clearly vested interest in the outcome. In a prior case, the ICJ had said that such witnesses would tend to "identify himself with the interests of his country, and to be anxious when giving evidence to say nothing which could prove adverse to its cause."[101] In this case, however, the court appeared to criticise Japan for not putting forth expert witnesses to explain certain aspects of its supposed research programme.[102]

---

95 Lucas Carlos Lima, "The Evidential Weight of Experts Before the ICJ: Reflections on *The Whaling in the Antarctic Case*", *Journal of International Dispute Settlement* 6 (2015): 621, 622–626.

96 "The Evidential Weight of Experts Before the ICJ", *id*. at 623.

97 (*Australia* v *Japan: New Zealand intervening)*, Judgment, ICJ Reports 2014, 226.

98 *Corfu Channel Case*, *supra* note 71, at 21.

99 *Pulp Mills on the River Uruguay*, *supra* note 10, at 72. In comparison, advice rendered by internal unofficial experts after the oral proceedings have concluded have indeterminate weight as not much has been disclosed about how such experts are consulted.

100 (2 December 1946) 161 UNTS 1716.

101 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 39, at 43. The court did note, however, two special features of this case. First, one of the parties was not appearing before the court, and secondly, the case involved in litigation relating to armed conflict.

102 "The Evidential Weight of Experts Before the ICJ", *supra* note 95, at 631–632.

As to the evaluation of the expert evidence, the court in *Whaling in the Antarctic* did not expressly identify any general criteria with respect to evidential weight or how competing accounts would be resolved. On the contrary, it openly expressed a strong preference for the experts to come to a consensus on all of the major issues, and appeared ready to accept any uncontested opinions.[103] The court also did not deviate from its previous practice of refusing to resolve any clashes in expert opinions.[104] Unsurprisingly, this approach has been criticised before: the search for the truth and the search for consensus are not paths that always converge, and the court should not adopt a totally hands-off approach, especially when the evidence is pivotal to the resolution of central issues in the dispute.[105] Just as unsurprising is that this area of law has been criticised by even the court's own judges[106] and is being strongly advocated for reform.[107]

3 Whether a more principled approach regarding the court's framework for admission and exclusion of evidence is plausible

We now come to the second part of the article. The survey above makes it clear that the case law of the ICJ is consistent with the court's rules: there is no requirement of relevance as parties are free to admit anything as evidence, and save for the ground of prior settlement negotiations, no exclusionary rules or judicial discretion to exclude evidence exist; it is only after all of the evidence have been admitted that the court's function to evaluate and weigh the evidence based on its reliability and value is engaged.[108] But even in discharging that

103 *Whaling in the Antarctic*, *supra* note 97, at 283–293.

104 *Case Concerning Sovereignty over Pedra Branca/Pula Batu Puteh, Middle Rocks and South Ledge (Malaysia* v *Singapore)*, Judgment, ICJ Reports 2008, 12, 59–60.

105 "The Evidential Weight of Experts Before the ICJ", *supra* note 95, at 633.

106 See for instance Bruno Simma, "The International Court of Justice and Scientific Expertise", *Proceedings of the Annual Meeting (American Society of International Law)* 106 (2012): 230, 230–232.

107 James Gerard Devaney, *Fact-Finding Before the International Court of Justice* (Cambridge: Cambridge University Press, 2016).

108 *Case Concerning Armed Activities on the Territory of Congo (Democratic Republic of the Congo* v *Uganda)*, Judgment, ICJ Reports 2005, 168, 200–201; *Pulp Mills on the River Uruguay Pulp Mills on the River Uruguay*, *supra* note 10, at 72. See also Keith Highet, "Evidence, the Court, and *The Nicaragua Case*", *American Journal of International Law* 81 (1987): 1, 9; Kenneth

function, the ICJ "recognises no formal or other rigid rules as to its assessment of evidence or the relative weight to be given to evidence in any particular category. It possesses a wide margin of discretion in the matter, and that discretion is limited only by the prohibition against arbitrary action."[109] Ultimately, the ICJ sees itself as being accountable only to the parties appearing before it,[110] and would normally avoid to "attempt a determination of the overall factual situation [of the case] and would limit itself to 'make such findings of fact as are necessary' so that it can respond to the submissions of the parties."[111] But should something be done about its lack of a framework to exclude evidence, or is the ICJ a *sui generis* entity that obviates the need for clear principles delineating its exclusionary discretion?

3.1 Whether particular features of the ICJ truly sets it apart from other tribunals

There are certainly features of the World Court that immediately distinguishes it from a domestic court, especially one that applies the common law (where there is a far greater emphasis on having rules to regulate the admissibility and exclusion of evidence). To begin with, the ICJ is a court for settling disputes between sovereign states, as opposed to a dispute between two civil parties or a dispute between the state and an accused person. The assumption then is that before the ICJ, the opposing states will always be at arms' length, be it in terms of representation or resourcefulness. What also follows is that parties would be assumed to act in good faith, and in any event, it is not in their own interests to submit evidence that are of questionable worth. Ultimately, there is great respect for sovereign equality – the bedrock of public international law – and as a

---

Keith, "The International Court of Justice and Criminal Justice", *International and Comparative Law Quarterly* 59(4) (2010): 895, 905; Katherine Del Mar, "Weight of Evidence Generated Through Intra-Institutional Fact-Finding Before the International Court of Justice", *Journal of International Dispute Settlement* 2 (2011): 393, 396.

109 *The International Court of Justice*, *supra* note 7, at Chapter VI(2)(b). See also *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 39, at 39–41.

110 See for instance *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12, 138: "the court has a passive role... The parties put forward facts and submit the evidence that they consider favourable to their claims, and the court takes them into consideration when making its decision. That is perfectly logical, because the purpose of the judgment is to decide as between the parties".

111 *Case Concerning Armed Activities on the Territory of Congo*, *supra* note 108, at 200.

consequence, the concept of what constitutes a fair trial as regards matters of evidence is affected, in that a paternalistic approach to regulation at the admissibility phase is eschewed.[112] The court's jurisdiction being dependent on the parties' consent also means that party autonomy, including in matters of evidence, is given primacy; put another way, if there are too many complex rules of evidence, parties may be discouraged from accepting the court's jurisdiction.[113] In these respects, the ICJ is unique, because most other international tribunals do not involve only states as parties across the aisle.

It is also important to note that the ICJ does not quite use a typical trial process for fact-finding since the court hears and decides questions of fact and law alike with no jury in the equation; further, as seen in its statute, rules of court, and practice directions, evidence comes in three main forms: expert testimony, witness testimony, and documents (but seldom affidavits), but given the nature of most litigation before the ICJ, documentary evidence assumes the most important role.[114] If the production of evidence is out of time, the opponent can object to its admission or the court can reject the evidence, and the court has an inquisitorial role in that it can question the witness directly or require parties to answer questions relating to the evidence, but otherwise much is left to the parties to decide what evidence to adduce to prove their case. Indeed, because the court also cannot directly compel the production of evidence,[115] it often relies on the parties to come up with a *compromis* containing agreed facts.[116] Thus, key evidentiary tools often associated with common law adjudication (discovery and cross-examination) and civil law adjudication (judge-led proceedings) recede in importance for proceedings before the ICJ: the evidence is not rigorously tested by either the parties or the court, but simply analysed (by the court) after all of the evidence have been put in.[117]

---

112 "International Courts and Tribunals, Evidence", *supra* note 39, at [8].

113 "International Courts and Tribunals, Evidence", *id*. at [8]–[10].

114 *Evidence Before the International Court of Justice*, *supra* note 12, at 231. State have also successfully adduced maps, photographs, models, and media: see for instance *Fisheries Case (United Kingdom* v *Norway)*, Judgment, ICJ Reports 1951, 116; *Case Concerning the Temple of Preah Vihear (Cambodia* v *Thailand)*, Judgment, ICJ Reports 1962, 6; *Continental Shelf (Tunisia* v *Libya Arab Jamahiriya)*, Judgment, ICJ Reports 1982, 18.

115 As seen in our survey of its rules, however, it can request parties to provide documents, call witnesses and experts on its own accord, and conduct site visits.

116 *Litigation at the International Court of Justice*, *supra* note 12, at 439–441.

117 See also *Litigation at the International Court of Justice*, *supra* note 12, at 383: "the Court has always made a conscientious effort to develop its own system of evidence, taking elements from different systems of law, without fully aligning itself with any of them."

In contrast, exclusionary rules were conceptualised with certain characteristics in mind that are simply not found in the ICJ: a common law, adversarial system; jury (for which traditional exclusionary rules were designed for) rather than bench trials; criminal rather than civil proceedings (or at least they are applied less rigorously in the latter); and the machinery of the state against vulnerable persons, rather than state versus state.[118] And it is not just domestic law systems that the ICJ stands in contrast with; apart from status of parties, the ICJ is also different from international criminal courts, international human rights courts, regional appellate courts, and international arbitration tribunals given the extremely broad range of subject matter it has purview over – it presides over, amongst others, commercial disputes, human rights claims, and even criminal claims. But at least four counterpoints may be made in response to an over-emphasis on the ICJ's supposed *sui generis* character.

First, serious limitations with the court's lack of exclusionary rules or an exclusionary discretion have been identified through a series of cases which we have just seen above. It is axiomatic that for any judgment to have legitimacy, the evidential foundations must be strong, and concomitantly, there should at least be some mechanisms to sieve out problematic evidence at an early stage; doing so also saves the court and parties the unnecessary waste of time and resources.[119] Why should all of this be less true for the World Court, even though (or just because) it does not deal exclusively with criminal matters and parties are presumed to be of equal footing? In the days of the PCIJ, questions of evidence and disputes of fact did not really arise as the disputes revolved predominantly around legal questions such as the application of treaties.[120] But times have changed dramatically. Apart from the cases we surveyed above showing the problems when there are no exclusionary grounds, the modern dispute brought before the ICJ tends to involve complex and voluminous amounts of evidence and fact-finding is no longer a straightforward exercise.[121] It stands to reason to have some filtering mechanism in place. If the objection is to preserve the principle of free admissibility and the admissibility-weight divide, no alternative to improving the current evidentiary regime within those confines appears to have been offered. Further, as the practice of the ICC has shown, exclusionary rules do not exist just to protect accused persons who are presumptively vulnerable. The sanctions that were meted out against the

118 See generally *Evidence and the Litigation Process*, *supra* note 52, at Chapter 1.
119 See *Evidence in International Litigation*, *supra* note 48, at 33.
120 *Litigation at the International Court of Justice*, *supra* note 12, at 384.
121 *Litigation at the International Court of Justice*, *id*. at 382–387.

witnesses were perjured were against witnesses of the accused person, and not the prosecution.

Secondly, as we have also seen above, there is no lack of guidance from other international tribunals as to how certain exclusionary rules may be expressed, and how they may help ensure fairer outcomes in certain cases. Indeed, while it has often been said that evidentiary regimes in the international plane are generally liberal because this presents the best compromise between civil and common law traditions, it is misleading to collapse all types of international tribunals into a monolithic entity. For instance, it might make sense, from an equalisation perspective, for a human rights tribunal to have a liberal admissibility regime because for such a tribunal it is always the individual suing the state, rather than an individual being criminally charged by an international apparatus.[122] In the human rights context, an individual is much less disposed to find incriminating evidence against the state than the other way round. A blanket principle that all international tribunals have no strict rules on evidence does not stand up to critical scrutiny. That certain international tribunals have taken steps to sieve out or at least address problematic evidence only fortifies this point.

Thirdly, in municipal legal systems, appellate courts exist to correct the indecisions made by the courts of first instance, be it in matters of law or matters of discretion (and evidence law falls under both). For the ICJ, there is no system of appeal. Any decision rendered is final and binding. Having rules may be seen as an impediment or as favouring a system over another, but the better view may be to treat such rules as being potentially helpful in promoting accuracy and legitimacy in decision-making. This is all the more so when the matter is tried only once and there is no possibility of correction by a superior tribunal.

Finally, it may be said that the ICJ's evidentiary practice over the years is actually conducive to an adoption of some kind of framework or mechanism to better regulate the admissibility or exclusion of evidence.[123] Consider the

122 Part of this, of course, is also borne out of necessity. For instance, under the individual communications complaints mechanism for the Human Rights Committee, there is a pre-requisite of exhaustion of local remedies. This pre-requisite means that all relevant findings of fact would already have been made by the domestic courts. However, this does not mean that absolutely no issues of evidence (admissibility and exclusion specifically) would arise at the international phase. Questions of evidence may also arise in an indirect way in the context of the European Court of Human Rights. For instance, whether an applicant had received a fair trial for the purposes of art. 6 of the European Convention for Human Rights (1950) ETS 5 would depend on whether the rules of evidence were breached in accordance with the domestic law in question.

123 See also *Litigation at the International Court of Justice*, *supra* note 12, at 383.

following propositions that the ICJ have come up with in respect of issues that, upon reflection, may not necessarily fall neatly on either side of the perceived divide between admissibility and weight:[124]

(a) Hearsay evidence is given little or no weight;[125] contemporaneous evidence from persons with direct knowledge of the facts on the ground is preferred.[126]

(b) Save for the testimony of experts, opinion evidence is given little or no weight.[127]

(c) Evidence of disinterested witnesses is preferred.[128]

(d) Evidence that is uncontested, against one's own interests, or that acknowledges facts or conduct unfavourable to the state represented by the person offering the evidence are given more weight.[129]

(e) Evidence emanating from official sources is preferred;[130] where international organisations, particularly UN bodies, have made findings of fact elsewhere, such findings would not be lightly disturbed.[131]

(f) Evidence emanating from a single source is treated with caution.[132]

(g) Evidence that may not directly prove the facts alleged may nonetheless be considered as material that is corroborative or circumstantial.[133]

(h) Direct evidence is preferred, but liberal reliance on circumstantial evidence is permitted if the direct evidence is under the exclusive control of the

---

124 See also Ho Hock Lai, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford: Oxford University Press, 2008), 256–259 and 311–314 as to why international tribunals appear to dispense with exclusionary rules but in practice apply them through the device of weight.

125 *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland* v *Albania)*, Judgment, ICJ Reports 1949, 4, 17; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 39, at 42.

126 *Case Concerning Armed Activities on the Territory of Congo*, *supra* note 108, at 201.

127 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 39, at 42.

128 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, *id*. at 49.

129 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, *id*. at 49, 61.

130 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 141–146; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 81, at 135.

131 *Case Concerning Armed Activities on the Territory of Congo*, *supra* note 108, at 206–237. Cf *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403.

132 *Oil Platforms*, *supra* note 11, at 190; *Case Concerning Armed Activities on the Territory of*, *supra* note 108, at 200–201.

133 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 39, at 40.

opposing party and the circumstantial evidence is not contradicted by available direct evidence or accepted facts.[134]

(i) Documents that are not part of a publication readily available will likely be rejected.[135]

(j) Judicial notice may be taken of matters of public knowledge, such as matters that have received extensive coverage in the world.[136]

Notably, none of these points would look out of place in a common law system, despite the ICJ's apparent embracement of the civil law tradition of not having any exclusionary rules. There is a clear preference for the most reliable evidence, and such evidence must also have some degree of relevance. Yet, without a proper framework to assist the court as to when evidence can be admitted or should be excluded from the outset, one witnesses a phenomenon not unfamiliar in jurisdictions that apply exclusionary rules to its system of evidence law and also do not have juries as fact-finders: when exclusionary rules are difficult or inconvenient to apply, such rules are circumvented by re-characterising the problematic evidence as potentially useful evidence (for instance, circumstantial evidence); after the evidence has been admitted and the full context of events apprised of, the court can later adjust the weight of the evidence if need be.[137] This, in effect, is really no different from the ICJ bifurcating the regulation of evidence into admissibility (where there are no exclusionary rules and parties are free to submit whatever they wish, subject to timely filing and objections from their opponents) and appreciation (the court would evaluate whether the claims are properly proven by assigning the appropriate weight to the evidence).[138]

But in view of the cases that we have seen in this article, the ICJ is presented with two choices going forward. The first is to preserve the status quo and change nothing. This means that while evidence from prior settlement negotiations continues to be inadmissible by virtue of the established jurisprudence, the court will not and cannot do anything about a party attempting to adduce evidence that is forged, evidence that is obtained from a violation of domestic or international law, evidence that may reveal state secrets, or evidence that

134 *Corfu Channel Case*, *supra* note 71, at 18–32; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 81, at 130–131.

135 *Territorial and Maritime Dispute (Nicaragua* v *Colombia)*, Judgment, ICJ Reports 2012, 624, 632.

136 *United States Diplomatic and Consular Staff in Tehran Case*, *supra* note 73, at 10.

137 See generally *The Law of Evidence in Singapore*, *supra* note 94, at Chapter 2.

138 See also *Litigation at the International Court of Justice*, *supra* note 12, at 385–386.

may be privileged. In addition, the court will continue to place no restrictions on what qualifies as expert evidence, and will not attempt to resolve conflicting expert evidence either. And these issues are just based on the state of the law today – new cases down the road would only introduce other categories of problematic evidence which the court has to grapple with. The second choice is to attempt to take steps to ensure as much as possible that situations such as those just mentioned (and maybe even new ones) do not arise. Naturally, one may ask: is it really necessary to change the existing system, and even if it is necessary, how should the change look like?

3.2 Making the case for codifying the ICJ's exclusionary discretion

A legal system "without rules of evidence altogether", and one which relies on "fact-finders to give relevant evidence, in whatever form, the weight it deserves", has been described as a utopian ideal that may be incompatible with reality.[139] Such a system presupposes the existence of a near-perfect fact-finder, but at the same time also ignores important notions such as fairness and due process which are integral to adjudication. Proponents of freedom of admissibility may indeed feel very confident about the abilities of ICJ judges in evaluating all manner of evidence, however tainted it may be. But at the end of the day, it is not just about professional ability, but also about the image the court seeks to project. On a basic level, the court surely would desire its judgments to be built on the most robust of evidential (and legal) foundations. Yet this must be the function of any given court, whether domestic or international. This it can, arguably, achieve with or without exclusionary rules or an exclusionary discretion. It is on the aspiratory level that one must decide if the ICJ, given its unique and vantage position as an apex resolver of inter-state disputes, should have anything to say about its moral legitimacy and concern with integrity of proceedings as well.[140]

To illustrate, the objection to admitting evidence that in its obtainment had violated domestic or international law, state confidentiality, or privilege is not so

139 Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (Oxford: Oxford University Press, 2010), vi. While Robin Auld wrote this with respect to criminal evidence, for the reasons that follow, it may still be important to reject certain types of evidence from being admitted.

140 In other words, while the current ICJ evidentiary regime is similar to Jeremy Bentham's Natural System of Procedure, it seems to fail to take into account evidentiary rules with non-epistemic significance or assumes that rectitude of decision is the solitary aim of the court.

much that such evidence does not help the court in its quest to find the truth and reach a factually just outcome. Such evidence may well be highly probative and even highly reliable. However, admitting them freely is tantamount to a court endorsing a flagrant disregard for due process and maybe even encouraging impunity. Furthermore, there are strong practical reasons for rejecting or excluding problematic evidence from the outset. As we have seen from the survey of the ICJ cases, evidence improperly obtained has the potential to cause great damage or even violate another state's rights, or at the very least unnecessarily protract proceedings. Some of these violations also have the potential to cause irreversible harm, for instance when state secrets are compromised or when privileged documents are stolen. Without any rules, practice, or jurisprudence to prevent, deter, or sanction bad practices in the admission of evidence, states are given a free pass to push the limits of acceptability. In the *Corfu Channel Case*, the United Kingdom believed it had free rein to obtain evidence for the purposes of presenting it to an international tribunal. It violated the territorial integrity of another state in doing so. In *Maritime Delimitation*, Qatar did not think there was any harm in submitting what were probably forged documents. It is deeply ironic that the current evidentiary system which promotes maximum freedom to adduce evidence does as much harm to the states' sovereign interests as it claims to respect.

Thus, taking into account the current gaps in the ICJ's framework for admission and exclusion of evidence and the practices of other international tribunals, it is proposed that the ICJ could adopt,[141] at least as a start, a general provision pertaining to the court's exclusionary discretion as part of its framework. This new provision would state:

> The court has the discretion to exclude any evidence sought to be admitted. This discretion may be exercised even if the party whom the evidence is brought against does not raise any objections to the admissibility of the evidence in question. In exercising this discretion, the court shall consider not only the relevance, materiality, and reliability of the evidence but also its actual or potential prejudicial effect if it is admitted. Prejudicial effect includes, but is not limited to, a violation of another state's rights, the obfuscation of issues,[142] and the wasting of time. In exercising the discretion, the court shall also consider the need to ensure integrity and fairness in the proceedings.

141 Arts. 69 and 70 govern amendments made to the ICJ Statute. Alternatively, this rule may be included in the court's Rules of Court, which is probably the path of less (political) resistance and for which the applicability of the rules is in all likelihood not lessened.

142 The phrase "obfuscation of issues" may be of concern if one views this as requiring the court to examine the substance of the evidence, in that the distinction between the procedural examination of admissibility of a piece of evidence and the substantive examination of the value of or weight given to that evidence becomes thin. The concept of obfuscation in this

Four inter-related considerations guided the formulation of this provision. The first is that the aim of the ICJ should not just be rectitude of decision, though it is obviously important; its adjudication process should be informed by non-epistemic factors such as legitimacy and accountability as well. Accordingly, the relevance, materiality, and reliability of a piece of evidence may not be necessary and sufficient conditions for its admissibility, though the principle of free admissibility of evidence is still largely preserved as this rule is discretionary. In other words, this discretion does not act strictly as an admissibility gateway or prescribe admissibility conditions, in that it may be exercised at any point, though in practice it is likely to be used as a residual power so that the court can be apprised of as much evidence as possible before deciding if a certain piece or certain pieces of evidence should be excluded.

Secondly, rather than exhaustively list discrete categories of evidence that may be excluded, it may simply help to be more flexible by providing the court a broad (but not pointlessly wide) discretion. This is also more consistent with the current evidentiary regime (which is generally flexible and does not have fixed rules or exceptions, and reflects both civil and common law traditions); nuances of this discretion can be developed jurisprudentially in any event.[143]

Thirdly, the nature of this exclusionary discretion means that the court's role in respect of admitting evidence is not to be confined to the post-admissibility phase of merely determining the weight of the evidence. It is meant to prompt the court to be more proactive in sieving out undesirable evidence, and acts as a means to encourage the court to be more accountable insofar as it is compelled to apply its mind to contested questions of evidence, especially in its written judgments. It is also designed to cover situations where a state may fail to raise an objection about admissibility, as it should not always be assumed, without exception, that parties would truly be at arms' length. If there is a concern that

---

context may perhaps be compared with abuse of the court's process. The introduction of evidence that appears designed to vex, embarrass, or scandalise the other party will not fall under the limb of "obfuscation of issues", but probably under the limb of "wasting of time". What may fall more neatly under obfuscation of issues may, for instance, be evidence that clearly confuses or distracts the tribunal. Suppose a dispute is about whether a state had committed an illegal cyberattack against another state. The accusing state, in an attempt to establish motive, tries to adduce evidence relating to the accused state's human rights track record to show that the attack was possibly a retaliation against the accusing state's previous criticism of the accused state. On its face, such evidence should be considered extraneous to the issues at hand and an obfuscation.

143 The growth of the jurisprudence depends on the court's elaborations in its written judgments on how the discretion is invoked. As the jurisprudence develops, it is hoped that states would take the cue and be more selective in the admission of their evidence.

this discretion may encourage parties to lodge vexatious applications to contest admissibility at every turn, this may be solved by developing a pre-trial mechanism for resolving key evidential disputes; in any event, the nature of any discretion is that there is a choice not to exercise it for or against any party.

Finally, it is preferable that an exclusionary discretion is clearly delineated in statutory law. The alternative to codification would be to rely on the court's inherent powers or inherent jurisdiction, but this is undesirable for various reasons, ranging from unnecessary uncertainty in the grounds and scope of application of the power or jurisdiction, to the normative justification for such an exercise.[144] Moreover, the invocation of inherent powers is, by definition, reserved for highly exceptional situations. While leaving it to the courts to develop the contours of its inherent powers may seem more consistent with the ICJ's subscription to the principle of free admissibility of evidence, as we have seen in the jurisprudential survey, the better way forward may be to crystallise a clear rule for the court to apply and for the parties to follow, than to wait for even more unjust outcomes – as mentioned, the judicial development of a power is not inconsistent with the statutory provision of one.

To be clear, no claim of absolute originality is made of this proposed provision; similar provisions with varying elements are already found in the rules of procedure and evidence of other international tribunals that run the full spectrum, such as the PCA,[145] ICTY,[146] ICC,[147] and ICSID,[148] as well as various domestic evidence statutes.[149] All of these provisions essentially require the tribunal, in determining whether to admit or exclude a piece of evidence, to make a balancing assessment based on all the circumstances of the case, but the

144 See generally Chen Siyuan, "Is the Invocation of Inherent Jurisdiction the Same as the Exercise of Inherent Powers?", *International Journal of Evidence & Proof* 17(4) (2013): 367.

145 Permanent Court of Arbitration Arbitration Rules (17 December 2012), r. 27. See also Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 9, January 2015), r. 87.

146 Rules of Procedure and Evidence of the International Criminal Tribunal of the Former Yugoslavia UN Doc IT/32/Rev3, 30 January 1995, r. 89(D). However, it is interesting to note that the ICTR and the Special Court for Sierra Leone do not have equivalent provisions in their rules, but the Special Tribunal for Lebanon does (r. 149 of its Rules of Procedure and Evidence).

147 Rules of Procedure and Evidence of the International Criminal Court, UN Doc PCNICC/2000/1/Add.1, rr. 63 and 73.

148 International Centre for the Settlement of Investment Disputes Convention Arbitration Rules (10 April 2006), r. 34(1). See also International Bar Association Rules on the Taking of Evidence in International Arbitration (2010), art. 9, which establishes that an arbitral tribunal may exclude a document from evidence on grounds of special political or institutional sensitivity.

149 See for instance s. 135 of Australia's Evidence Act 1995, s. 8 of New Zealand's Evidence Act 2006, or r. 403 of the United States' Federal Rules of Evidence.

proposed provision tries to take into account the particular characteristics of the ICJ and its general approach to matters of evidence discussed above. Further, while it is accepted that such a balancing test is not a perfect mechanism,[150] when it is applied to the different fact situations of the ICJ cases surveyed earlier, it would seem to prevent or solve most of the problems that were identified:

(a) Evidence that is forged or falsified is definitely unreliable and also affects the integrity fairness of the proceedings if admitted. Of course, a mere general exclusionary provision is not going to prevent or deter all attempts at forgery or falsification – some authentication process is required when the evidence is challenged, and sanctions may also be needed – but at least the court can now exclude such evidence completely instead of giving allegedly or even clearly falsified information ambiguous weight in its written judgments.

(b) Evidence that is obtained through a violation of law, regardless of whether the violation is that of a domestic or international law, will probably not pass muster under this test. The prejudicial effect of the violation may depend on, amongst other factors, the nature of the illegality and the violation (and extent of it) of the opposing state's rights, while the integrity or fairness of proceedings may depend on the complicity in illegality of the state seeking to adduce the evidence. Having said that, a violation of a domestic law is arguably not a matter that should concern the ICJ, since it is only permitted to determine whether violations of international law have occurred.

(c) Evidence that implicates an opposing state's interests, for instance in the form of confidential information or privileged communications, will likely be excluded, especially if it was obtained in violation of a law. Again, the objection to the admissibility of such evidence may not necessarily be based on a lack of probative value or reliability, but is instead based on policy considerations such as the preservation of integrity and fairness of proceedings. The proposed exclusionary discretion is also phrased in a way that avoids the dilemma of whether to characterise privilege as an immunity issue or as an exclusionary issue. However, the counterpoint of whether states may resist disclosure with blanket assertions of state secrets needs to be considered. This may be solved in part by the drawing of adverse inferences.

---

150 For the criticisms of the balancing test, see generally Ian Dennis, *The Law of Evidence* (London: Sweet & Maxwell, 2013), Chapter 2. Issues include the practical difficulty of trying to balance probative value and prejudicial effect and identifying the normative justification for excluding relevant evidence.

(d) For experts appointed by the parties, the court should be mindful of the experts' credentials and whether there are any conflicts of interest. Presumably, experts appointed by the court would not run into these issues. It is of course accepted that the exclusionary discretion does not usually provide a resolution to the problem of conflicting expert witnesses, because that problem is mostly solved either before the evidence is admitted (for instance, through some sort of pre-hearing "hot-tubbing" process where points of consensus and departure are identified) or after the evidence has been admitted (where the court would need to evaluate the evidence in the light of its internal and external consistencies). Indeed, coming up with a framework for resolving conflicting expert evidence would require the endeavour of another article altogether. Nonetheless, the exclusionary discretion can still be useful in sieving out clearly unreliable expert opinion and forces parties to put forth only the most relevant and reliable experts; this is preferable to the court expressing no view on conflicting expert opinion as it cannot detect any consensus.

(e) For completeness, while already an established ground of exclusion under the court's case law, evidence from prior settlement negotiations will be excludable under this provision as well as such evidence is always going to be sufficiently prejudicial, regardless of whether it evinces some sort of admission of liability. It is also irrelevant and as a matter of policy, permitting its admissibility may discourage amicable settlement of disputes. Finally, while evidence that is filed out of time is already covered by existing rules,[151] the considerations set out in this provision may be used by the court in deciding whether to make an exception in allowing admissibility, instead of relying solely on whether there is an objection filed by the opposing state.

Alternatively, if a more categorical approach in formulating the discretion and a different normative justification for the discretion is preferred, the provision could look like this:

> Notwithstanding its relevance, the Court may, at the request of a party or on its own motion, exclude from evidence or production any document, statement, or oral testimony for any of the following reasons:
>
> a. A lack of reliability or authenticity;[152]
>
> b. The obtainment of evidence is tainted by an international illegality;

151 As mentioned above, by rules such as art. 52 of the ICJ Statute.

152 Alternatively, the factor of authenticity may be replaced with less nuanced language, along the lines of fabricated evidence.

c. Grounds of privilege or confidentiality that the Court determines to be compelling; and
d. Grounds of political sensitivity that the Court determines to be compelling.

Certain features of this alternative formulation deserve further elucidation. First, ground (b) clarifies that only an international wrong will give rise to reason for the ICJ to exclude evidence. It also disregards the factor of whether the party seeking to adduce the illegally obtained evidence did in fact have a role to play in that illegality – the legitimacy of the ICJ would suffer if its decision was founded on evidence obtained in violation of international law.

Secondly, ground (c) is meant to apply where evidence sought to be admitted implicates an opposing state's interests, such as when admissibility of such evidence would lead to a divulgence of confidential state secrets, or when such evidence relates to privileged attorney-client communications. This avoids two quandaries: parties are no longer faced with the dilemma of whether to characterise privilege as an immunity or exclusionary issue, while the coupling of privilege and confidentiality exempts the court and parties from having to go through the exercise of having to determine which of the two closely related concepts is at play.[153]

Thirdly, ground (d), which is not found in the general formulation of the discretion, may be invoked on the rare occasion where a particular piece of evidence does not engage any of the other sub-sections, but the court has reason to exclude such evidence out of respect for state sovereignty, or the need to ensure that states will continue to consent to the jurisdiction of the ICJ for the resolution of inter-state disputes.[154]

Fourthly, the inclusion of the requirement that the court must find a compelling reason to exclude evidence for grounds (c) and (d) emphasises that the court has to undertake a balancing assessment when excluding evidence on such grounds. The flexibility accorded to the court in undertaking such an assessment is consistent with the current evidentiary regime, and the meaning of the term "compelling" can be developed jurisprudentially. The high threshold required to exclude evidence on privilege, confidentiality or sensitivity grounds also provides the court with an instrument to ward against the potential deluge of unmeritorious applications to exclude evidence.

---

153 See generally *Evidence Before the International Court of Justice*, *supra* note 12, at Chapter 6.
154 See also *Evidence Before the International Court of Justice*, *id.* at 20–21; art. 36 of the ICJ Statute. For instance, this ground may be invoked when evidence was obtained through espionage, which at this point does not appear to amount to an international wrong but may be in violation of domestic laws.

Finally, this proposed formulation omits the consideration of whether the evidence damages, or is antithetical to the fairness or integrity of the proceedings. In this respect it distinguishes itself from international tribunals whose exclusive remit is criminal law and focuses on equality of arms instead of the apparent protection of a party. All things considered, this alternative version is inherently less flexible than the primary version, but notably, regardless of which formulation is applied to the cases we had surveyed earlier, the conclusions (of preventing the said problems as identified in the survey of ICJ cases from arising) are the same.

4 Conclusion

The ICJ, as the principal judicial organ of the UN, bears a heavy mandate. The continued legitimisation of public international law is a constant project-in-progress, and depends in large part on the defensibility of the judgments delivered by a tribunal that is in a particularly unique position presiding over inter-state disputes involving a broad spectrum of issues. On matters of procedure and substance, the law is fairly established, or the very least discernible. On matters of evidence, however, parties appearing before the court have virtually no guidance despite the upward trend of more and more voluminous evidence being submitted to the court. Though the ICJ has had a longstanding practice in applying the freedom of admissibility of evidence and it prefers to analyse issues of evidence as a matter of weight, this article has sought to demonstrate that certain critical gaps in adopting this approach exist – a situation exacerbated by first, the virtual lack of exclusionary rules and an exclusionary discretion and secondly, the shift in focus of disputes before the court from mere treaty interpretation to conflicts requiring judicial evaluations of complex factual matrices. The gaps identified in this article with respect to the court's admissibility framework include actual scenarios where the ICJ had been placed in a difficult spot in the face of evidence that was fabricated by a party, evidence that was illegally obtained by a party, privileged evidence that was stolen by a party, and evidence that saw no consensus reached by opposing expert witnesses appointed by the parties. In all those scenarios, the court was either unwilling or unable to address the evidential issues and this is plainly unsatisfactory.

In this article, I have tried to show that the proposed introduction of a judicial discretion to exclude evidence in the court's rules is a small but important step in closing these gaps and obviating the aforementioned scenarios,

enhancing the ICJ's accountability and legitimacy, and protecting the rights of states. The proposed discretion complements, rather than impedes, the court's predominant concerns of respecting sovereign rights and equality and rectitude of decision. While it remains important to recognise the philosophy and special features of the court, the better way forward is not to simply keep insisting on the rights of sovereign states and expecting them to be wholly responsible for deciding what should be presented as proper evidence before the ICJ. Many international tribunals have, over the years, gradually recognised the need for the adjudicators to play an active role or at least have a role in sieving our problematic evidence either at the outset or at the residual stage, and they have achieved this through the integration of discretions similar to the one proposed here into their procedural and evidential rules, the introduction of guidelines for best practices for parties and counsel, sanctions for those attempting to mislead the court, or a combination of these measures. These international tribunals, often also representing both civil and common law traditions, no longer view exclusionary rules or an exclusionary discretion as unique to particular municipal legal systems. The time is ripe for the ICJ to start doing the same, and it is hoped that this article is of some contribution in paving the way.

Acknowledgments: The author thanks Tan Jun Hong for his commendable research assistance and thorough comments on earlier drafts of this paper; this article builds on various ideas that the author and him had long conversations about, especially as regards the formulation of the proposed discretion. The author also thanks his colleagues Professors Yeo Tiong Min, Irene Calboli, Goh Yihan, Gary Chan, Lee Pey Woan, Loo Wei Ling, Tham Chee Ho, Mahdev Mohan, Eunice Chua, Dorcas Quek, Kenny Chng, and Prashan Reddy Thikkavarapu for their extensive feedback when an earlier draft of this paper was presented at a Faculty Research Series seminar, the anonymous referees for their helpful comments, and Dr Charanjit Singh for facilitating the entire review process.